THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM
THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

Appellate Case No. 2019-001900

Duke Energy Carolinas, LLC, Appellant-Respondent,

v.

Office of Regulatory Staff, Hasala Dharmawardena, CMC Recycling, Cypress Creek Renewables, LLC, SC Department of Consumer Affairs, Sierra Club, South Carolina Coastal Conservation League, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, Inc., the South Carolina State Conference of the National Association for the Advancement of Colored People, Upstate Forever, Vote Solar, and Walmart, Inc., Respondents

Of whom South Carolina Energy Users Committee and The South Carolina Office of Regulatory Staff are Respondent-Appellant

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BRIEF OF RESPONDENT- APPELLANT SOUTH CAROLINA ENERGY USERS COMMITTEE

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STATEMENT OF THE ISSUES ON APPEAL

I. **Did the South Carolina Public Service Commission err in granting Duke recovery of its nuclear plant preconstruction costs, the error being that the Base Load Review Act supporting recovery of preconstruction costs had been repealed and consequently, Duke was foreclosed from recovery of these costs?**

STATEMENT OF THE CASE

Duke Energy Carolinas, LLC ("Duke") filed its application November 8, 2018 pursuant to S.C. Code Ann. Sections 58-27-820 and 58-27-870 requesting an adjustment and increase in its electric rate schedules and tariffs. Duke's application included a request for recovery of preconstruction costs of approximately $125 million with a return resulting from its abandoned Lee Nuclear Station. Interested parties, including the Respondent-Appellant South Carolina Energy Users Committee ("SCEUC") were permitted to intervene in the docket.

The South Carolina Public Service Commission ("Commission") conducted an evidentiary hearing March 21, 2019 through March 27, 2019. The Commission issued its Order No. 2019-323 in Docket No. 2018-318-E May 21, 2019. Relevant to this appeal, the Commission granted Duke recovery of $125 million in preconstruction costs but declined to grant Duke a return on the recovery of those costs.

Duke, the Office of Regulatory Staff ("ORS"), and SCEUC filed and served petitions for rehearing and reconsideration of Order No. 2019-323. The Commission issued its Order No 2019-455 October 18, 2019 granting in part and denying in part the petitions for rehearing and reconsideration. The Commission denied SCUEC's petition for rehearing and reconsideration on all issues raised, including SCEUC's objection to Duke's recovery of preconstruction costs.

Duke filed and served its notice of appeal November 15, 2019. SCEUC and the ORS filed and served their notices of cross appeal November 20, 2019.

STATEMENT OF FACTS

In 2007 Duke decided to incur preconstruction costs for its Lee Nuclear Station project. In December 2007, Duke filed its application for a project development order seeking Commission approval for its decision to incur preconstruction costs for its proposed Lee Nuclear Station. (See

Order No. 2008-417 in Docket No. 2007-440-E). While Duke might have elected in 2007 to seek Commission approval of its decision to incur preconstruction costs pursuant to S.C. Code Ann. Sections 58-27-820 and 58-27-870, it elected instead to file its request for approval of its decision to incur preconstruction costs associated with its Lee Nuclear Station under S.C. Code Ann. Section 58-33-225 of the Base Load Review Act ("BLRA"). The Commission issued its project development order holding that Duke's decision to incur preconstruction costs was reasonable and prudent. Order No. 2008-417. The Commission also authorized Duke to incur the South Carolina allocable share of $230 million in preconstruction costs on a Duke total system basis through December 31, 2009.[1] Duke's service territory includes parts of North and South Carolina. The South Carolina allocable share of preconstruction costs was approximately 24% of Duke's total system cost. (Tr. P2053, l. 11 – p. 2054, l. 1; Tr. p. 686, l.20 – p. 687, l. 8). The South Carolina allocable share of the authorized preconstruction costs was approximately $55 million. Order No. 2008-417 did not rule on the prudency or recoverability of specific items of cost.

However, in 2011, Duke filed an amended project development application for approval of its decision to incur additional preconstruction costs to those previously authorized Order No. 2008-417. In Docket No. 2011-20-E, Duke and the intervening parties entered a settlement agreement wherein Duke would be authorized to incur the "absolute minimum amount of dollars necessary to keep the nuclear option available...." Order No. 2011-454 at p. 4. In approving the settlement, the Commission held that its prudency determination applied "only to the South Carolina allocable share of the additional pre-construction costs of $75 million without AFUDC, not to exceed $120 million with AFUDC for the period of January 1, 2011 through June 30, 2012."

[1]The Commission BLRA orders address the preconstruction costs on a Duke total system basis. On a Duke total system basis, preconstruction cost request was $230 million. The South Carolina allocable share of the preconstruction costs calculates to be approximately 24% or $55 million. Duke's North Carolina customers would be responsible for the balance of the preconstruction costs.

Order No. 2011-454 at page 17. The South Carolina allocable share of preconstruction costs authorized by Order No. 2011-454 would not exceed $29 million.[2] Taken together, Orders No. 2008-417 and 2011-454 authorized Duke to incur preconstruction costs on a Duke total system basis in an amount not to exceed $350 million for the period ending June 30, 2012.[3]

AFUDC is defined by the Base Load Review Act as "the allowance for funds used during construction of a plant calculated according to regulatory accounting principles." S.C. Code Section 58-33-220(1). AFUDC is an accounting tool that permits a utility to capitalize its construction interest during the construction of generation facilities such as nuclear plants. By capitalizing its financing costs, a utility is afforded an opportunity to recover its financing costs in rates when the plant is placed in service. Robert L. Hahne & Gregory E. Aliff, Accounting for Public Utilities, 4-19 to 20 (Matthew Bender & Co., 2019). AFUDC is the interest that accrues during construction and represents the financing costs for Lee Nuclear Station project. (Tr. p 685, ll. 6-16).

By the June 30, 2012 deadline set in Order No. 2011-454, Duke had only incurred project development costs of $251 million on a Duke total system basis.[4] (Tr. p. 805-32, ll. 14-18; Fallon prefiled direct p. 32, ll. 14-18). The South Carolina allocable share of preconstruction costs authorized by the Commission under the BLRA, was $60 million. After June 30, 2012, Duke did not request additional authority to recover preconstruction costs in excess of the $60 million authorized by Order 2011-454. Consequently, Duke's ratepayers would have been responsible for no more than $60 million in preconstruction costs under the BLRA.

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[2] The South Carolina allocable share was approximately 24% of the $120 million authorized.
[3] The South Carolina allocable share was approximately 24% of the of the $350 million in authorized preconstruction costs or $84 million. However, Duke would only incur $251 million in preconstruction costs by June 30, 2012.
[4] As of June 30, 2012, the South Carolina allocable share was approximately 24% of the $251 million in authorized preconstruction costs or $60 million.

Duke submitted its Combined Operating License Application ("COLA") for its Lee Nuclear Station project to the NRC on December 13, 2007 and received its Combined Operating License ("COL") from the NRC December 19, 2016. (Tr. p. 805-7, ll. 1-9; Fallon prefiled direct at p. 7, ll. 1-9). Duke notified the Commission by letter August 25, 2017 that it had cancelled the Lee Nuclear Station project (Application p.10).

Duke maintained below that it incurred $518 million in preconstruction costs on a Duke total system basis, including $248 million in AFUDC.[5] In its application, Duke sought recovery of the South Carolina allocable share of its preconstruction costs of $125 million. (Application p. 10; Tr. p. 805-4, ll. 1-22; Fallon prefiled direct p. 4, ll. 1-22). To recover the $125 million, Duke sought annual recovery from its South Carolina ratepayers of $20 million over 12 years comprised of amortization expense of $11 million, and a net of tax return of $9 million on the unamortized balance for a total recovery of $240 million over the 12-year period. (Tr. p. 655-19, l. 6 – 655-20, l. 2; Smith prefiled direct p. 19, l.6 – p. 20, l. 2). However, the Commission granted Duke recovery of only the amortization expense of $125 million without a return on the unamortized balance of its investment. Order No. 2019-323 at p. 24.

As of June 30, 2012, Duke had incurred a Duke total system balance of $68 million in authorized AFUDC.[6] (Tr. p. 2056, l. 16 – p. 2057, l. 12; Exhibit No. 19). However, AFUDC increased by $180 million between June 30, 2012 and December 31, 2017, bringing the total financing charges incurred on the Lee Nuclear Station project to $248 million on a Duke total

[5] Duke sought recovery of certain of the its preconstruction costs projected through May 31, 2019 which total approximately $518 million after non-depreciable land was moved to Land held for Future Use. (Tr. p. 805-26, l. 8 – p. 805-27, l. 2; Fallon prefiled direct p. 26, l. 8 – p. 27, l. 2). However, Duke stopped recording AFUDC December 31, 2017 (Tr. p. 691, l. 14 – 692, l. 1)

[6] The South Carolina allocable share of AFUDC as of June 30, 2012 was approximately 24% of $68 million or $16 million.

system basis. [7] (Tr. p. 805-26, l. 8 – p. 805-27, l. 2; Fallon prefiled direct testimony at p. 26, l. 8 – p. 27, l. 2; Tr. p. 827, ll. 1 – 11).

Of Duke's request for recovery of $125 million in preconstruction costs from its South Carolina ratepayers, nearly half of the total request was financing cost. (Tr. p. 695, ll. 4-8). AFUDC nearly quadrupled after June 30, 2012. ORS witness Morgan testified that Duke's delay in seeking recovery of its preconstruction costs after June 30, 2012 caused AFUDC costs to balloon. (Tr. p. 2056, l. 16 – p. 2057, l. 12).

Because the nuclear plants were never constructed, the preconstruction costs for which Duke sought recovery are not used and useful to provide electricity. (Tr. p. 2015-6., ll. 11-14; Morgan prefiled direct p. 6, ll. 11-14) Duke concedes as much. See Application para. 17, p. 10 describing the cancelled nuclear project.

ARGUMENT

I

THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION ERRED IN GRANTING DUKE RECOVERY OF ITS NUCLEAR PLANT PRECONSTRUCTION COSTS, THE ERROR BEING THAT THE BASE LOAD REVIEW ACT SUPPORTING RECOVERY OF PRECONSTRUCTION COSTS HAD BEEN REPEALED AND CONSEQUENTLY, DUKE WAS FORECLOSED FROM RECOVERY OF THESE COSTS.

Duke elected to recover its nuclear plant preconstruction costs pursuant to S.C. Code Ann. Section 58-33-225 of the Base Load Review Act ("BLRA"). The General Assembly repealed the BLRA to prohibit Duke recovery of its preconstruction costs. Act 258, R287, H4375, Section 2.A

[7] The South Carolina allocable share of AFUDC in the filing was approximately 24% of $248 million or $60 million.

Notwithstanding the repeal of the BLRA, relying upon S.C. Code Ann. Sections 58-27-820 and 870, the Commission granted Duke recovery of twice the amount for preconstruction costs it was entitled to under the BLRA. The Commission erred.

The South Carolina General Assembly is vested with the constitutional authority to regulate publicly owned utilities. Article IX, Section 1 of the South Carolina Constitution. Consequently, ratemaking is a legislative function. *Berry v. Lindsay*, 256 S.C. 282, 290, 182 S.E.2d 78, 82 (1971). In regulating public utilities, the South Carolina Constitution requires the General Assembly to act to protect the public interest.

To discharge its ratemaking function, the General Assembly has delegated its authority to the Commission, and the Commission may exercise only that authority to set rates granted it by the General Assembly. *Nucor Steel v. South Carolina Public Service Commission,* 310 S.C. 539, 426 S.E.2d 319 (1992). The Commission is charged with setting rates that are just and reasonable. S.C. Code Ann. Section 58-3-140(A). Even though the General Assembly has entrusted the Commission with rate-making power, this grant of power is still subordinate to the General Assembly's ratemaking authority. *South Carolina Electric and Gas Company v. Randall, et al.*, Civil Action No.:3:18-cv-01795-JMC (D.S.C.)[August 6, 2018 opinion denying SCE&G's motion for preliminary injunction, p. 24 citing *Duquesne Light Co. v. Barasch,* 488 U.S. 299, 313-314 (1989)].

BLRA.

In enacting the BLRA, the General Assembly provided Duke with benefits not available under traditional forms of rate making such as provided in S.C. Code Ann. Sections 58-27-820

and 870.[8] With the passage of the BLRA, Duke was permitted to elect a regulatory process providing it with an advance prudency determination of the decision to incur preconstruction costs associated with the cost of constructing nuclear plants.[9] Prior to the enactment of the BLRA, Duke would have been compelled to demonstrate the prudency of the decision to build the nuclear plants retrospectively pursuant to S.C. Code Ann. Sections 58-27-820 and 870.

Were Duke to have elected to recover its nuclear costs pursuant to S.C. Code Ann. Sections 58-27-820 and 870, the risk was that in each rate case filed to recover its nuclear construction costs, including preconstruction costs, Duke would have had to demonstrate that its decision to construct the nuclear generating plants, or to continue to construct the plants, was prudent after Duke had incurred hundreds of millions of dollars in construction costs.

The BLRA eliminated the risk of an after the fact determination of imprudence by providing Duke with the opportunity to seek an order affirming the decision to construct a nuclear plant and incur the preconstruction costs before any preconstruction costs were incurred. The BLRA provided that the prudency of the decision to incur preconstruction costs was not subject to subsequent challenge.[10] *South Carolina Energy Users Committee v. South Carolina Electric and Gas,* 410 S.C. 348, 764 S.E.2d 913 (2014).

To avail itself of the novel benefits provided by the BLRA, Duke was required to meet certain criteria and provide the Commission with information demonstrating a range of technical detail for the nuclear powered facility, the need for the nuclear powered facility generation and

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[8] The title of the BLRA provides in part that the purpose of the Act was to "TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING ARITCLE 4 TO CHAPETER 33, TITLE 58 SO AS TO ENACT THE 'BASE LOAD REVIEW ACT'BY **REVISING** PROCEDURES FOR APPROVING COSTS ASSOCIATIED WITH THE ADDITION OF BASE LOAD GENERATION PLANTS….." Emphasis added.

[9] See SC Code Ann. Section 58-33-220(12) setting out those preconstruction costs subject to BLRA benefits.

[10] The prudency of individual items of cost or decisions after the issuance of a project development order may be challenged. S.C. Code Ann. Section 58-33-225(E).

sufficient information to establish the reasonableness and prudence of the potential fuel sources and generation under consideration, and such other information required by the Commission. S.C. Code Ann. Section 58-33-225(A), (B) and (C). Duke met its burden of demonstrating compliance with the BLRA and the Commission issued its project development Order No. 2008-417 pursuant S.C. Code Ann. Section 58-33-225(D).

Acting to protect South Carolina ratepayers from imprudent costs resulting from the abandonment of the nuclear plants, the General Assembly repealed the BLRA to prevent its future application. The General Assembly enacted A258, R287, H4375 which provides in part:

> SECTION 2.A. As of the effective date of this act, the Public Service Commission must not accept a base load review application, nor may it consider any request made pursuant to Article 4, Chapter 33, Title 58 other than in a docket currently pending before the Commission.

In construing the repeal of the BLRA, it is proper to consider the history of the period in which it was passed. *City of Spartanburg, v. Blalock*, 223 S.C. 252, 75 S.E.2d 360 (1953). After the abandonment of the nuclear construction at the VC Summer site in Jenkinsville, South Carolina, and Duke's decision to cancel the Lee Station nuclear plants, the General Assembly deliberated how it might act to protect ratepayers from having to pay costs of abandoned nuclear projects. In repealing S.C. Code Ann. Section 58-33-225, the General Assembly intended to protect ratepayers from payment of nuclear costs that are not used and useful. *Duquesne Light Co. v. Barasch,* 488 U.S. 299 (1989).

Act A 258, R287, H4375 became effective June 28, 2018. Duke filed its application below November 8, 2018. The Commission was precluded from considering a request for recovery of preconstruction costs pursuant to the BLRA and Duke sought recovery of its preconstruction costs pursuant to S.C. Code Ann. Sections 58-27-820 and 870.

Effect of Repeal of BLRA

The cardinal rule of statutory construction requires the Commission to ascertain the intent of the General Assembly in its application of a statute. *South Carolina Energy Users Committee v. South Carolina Public Service Commission,* 388 S.C 486, 697 S.E.2d 587 (2010). The Commission's application of that statute may not lead to an absurd result. *Hamm v. South Carolina Public Service Commission*, 287 S.C. 180, 336 S.E.2d 470(1985) holding that no matter how clear the language of a statute may be, the court will reject that meaning when it leads to an absurd result not possibly intended by the legislature; *Carolina Power & Light Company v. Town of Pageland*, 321 S.C. 538, 471 S.E.2d 137 (1996) holding that a statute will be given retroactive effect if to hold otherwise would lead to a result so plainly absurd that it could not possibly have been intended by the legislature or would defeat the plain legislative intent.

The intent of the General Assembly in enacting Act 258, R287, H4375, Section 2.A was to protect ratepayers from nuclear costs that were not used and useful for providing electricity. Duke's preconstruction costs are not used and useful to provide electricity. The legislative intent was to deprive Duke recovery of its nuclear preconstruction costs entirely. Duke sought and obtained project development orders and accepted the benefits of the BLRA. Duke continued to comply with its project development orders until the Commission issued its order below. Duke remained subject to the provisions of the BLRA and the repeal of the BLRA foreclosed any recovery of Duke's preconstruction costs.[11]

The Commission's construction of Act 258, R287, H4375, Section 2.A not only permitted Duke a second chance to recover its preconstruction costs, but also permitted Duke to double the

[11] Duke conceded that it continued to comply with the project development orders issued under the BLRA by filing the update reports required by both orders. (Tr. p. 805-25, ll. 6-15; Fallon prefiled direct testimony, p. 25, ll. 6-15).

recovery of its preconstruction costs. After limiting Duke's recovery from its South Carolina ratepayers under the BLRA to $60 million, the Commission authorized Duke recovery of $125 million from its South Carolina ratepayers pursuant to S.C. Code Ann. Sections 58-27-820 and 870. The Commission's construction of Act 258, R287, H4375, Section 2.A acted to circumvent the repeal of the BLRA. By authorizing Duke of preconstruction costs not used and useful to provide electricity, the Commission's construction of Act 258, R287, H4375, Section 2.A leads to an absurd result not intended by the General Assembly. The Commission erred and should be reversed.

Election.

Faced with the alternative remedies for recovery of its preconstruction costs in 2007, Duke elected to file its request under S.C. Code Ann. Section 58-33-225. An "[e]lection is simply what the term imports – a choice shown by an overt act between two or more inconsistent rights, either of which may be asserted at the will of the chooser alone." *Pacific Mutual Life Insurance Co. of California v. Rhame,* 32 F. Supp. 59, 63 (D.S.C.); *Hay v. South Carolina Tax Commission,* 273 S.C. 269, 255 S.E.2d 837 (1979). Duke's election to proceed under the BLRA was clear and unambiguous. *Carter v. Associated Petroleum Carriers*, 235 S.C. 80, 110 S.E.2d 8 (1959). The Commission issued a project development order affirming the prudency of Duke's decision to incur preconstruction costs for the Lee Nuclear Station. Order No. 2008-417. Duke was authorized to incur the absolute minimum amount of dollars necessary to keep the nuclear option available by June 30, 2012. See Order No. 2011-454. Neither Order No. 2008-417 nor Order No. 2011-454 was appealed.

Duke concedes that it was prohibited from seeking recovery of its preconstruction costs pursuant to S.C. Code Ann Section 58-33-225(G) of the BLRA. (Tr. p. 805-25, ll. 6-15; Fallon

prefiled direct testimony, p. 25. ll. 6-15). Having elected to finance the construction of its nuclear plants pursuant to the BLRA. Duke is now estopped from recovery of its preconstruction costs pursuant to S.C. Code Ann. Sections 58-27-820 and 870. [12]

The doctrine of election of remedies involves a choice between two or more different and coexisting modes of procedure and relief afforded by law for the same injury. *Tzouvelekas v. Tzouvelekas.* 206 S.C. 90, 33 S.E.2d 73 (1945). *Save Charleston Foundation v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985); *Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999). The rule is invoked to prevent double redress for a single wrong. The rule rests on the principle that the plaintiff should have a full opportunity to prove its claim to some form of relief but should not receive a double recovery. *Save Charleston Foundation v. Murray*; *Cowart v. Poore*, supra.

In *Save Charleston Foundation v. Murray,* the Court held that a party cannot agree to submit a claim to arbitration, receive a final and conclusive arbitration award and then relitigate the claim employing a different theory of recovery. The Court held that having obtained a recovery on its claim through arbitration, was prohibited from seeking further recovery for fraud, because the plaintiff had elected his remedy to proceed in arbitration.

In *Cowart v. Poore*, the Court held that plaintiff, in a dispute with his attorney, who first unsuccessfully sought recovery of his legal fees from the Resolution of Fee Disputes Board.("Board"), was precluded from recovery in a subsequent legal malpractice action. The Court held that having obtained a final judgment from the Board, the plaintiff had already elected his remedy.

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[12] *Electio semel facta, et-placitum testatum, non patitur regressum.*

Here, Duke sought and obtained relief under the BLRA. The Commission issued a project development order pursuant to S.C. Code Ann. Section 58-33-225(D) affirming the prudence of Duke's decision to incur preconstruction costs and authorized Duke to incur a limited amount of preconstruction costs. Order No. 2008- 417. Duke subsequently sought and obtained further limited relief under the BLRA was given further authorization to incur additional limited preconstruction costs. Order No. 2011- 454. The Commission orders are in all respects final. Having successfully obtained relief pursuant to the BLRA, Duke elected its remedy and was prohibited from seeking recovery pursuant to S.C. Code Ann. Sections 58-27-820 and 870.

The BLRA was repealed seven years after Order no. 2011-454 was issued and over that period, Duke's preconstruction costs more than doubled from $251 million to $518 million. Duke's attempt to recover its preconstruction costs pursuant to S.C. Code Ann. Sections 58-27-820 and 870 leads to a double recovery. Having elected its remedy to proceed to recovery its preconstruction costs under the BLRA, Duke is estopped by the Doctrine of election of remedies from further recovery of its these costs.[13] See also *White v. Livingston,* 234 S.C. 74, 106 S.E.2d 892(1959); Lawson *v. Rogers*, 312 S.C. 492, 435 S.E.2d 853 (1993).

Moreover, while the repeal of the BLRA rendered Orders No. 2008-417 and 2011-454 no longer enforceable, the fact remains that Duke procured the entry of both orders and accepted the benefits of both orders. Duke is now estopped from disavowing the orders. *Edwards v. Edwards,* 254 S.C. 466, 176 S.E.2d 123 (1970). In *Edwards v. Edwards*, the Court quoted favorably from *Scheper v. Scheper*, 125 S.C. 89, 118 S.E. 178 (1923) as follows, "[w]hile such a void judgment

[13] Duke's decision to seek recovery of its preconstruction costs pursuant to the BLRA as opposed to the provisions of S.C. Code Ann. Sections 58-27-820 and 870 was voluntary and intentional. Accordingly, Duke is estopped to recover its preconstruction costs by virtue of its waiver of the right to proceed under S.C. Code Ann. Sections 58-27-820 and 870. See *Holly Hill Lumber Co. v. Grooms*, 198 S.C. 118, 16 S.E.2d 816 (1941); *Johnson v. Life and Casualty Insurance Co. of Tennessee*, 191 S.C. 96, 3 S.E.2d 805 (1939); *Empire Buggy Co. v. Moss*, 154 S.C. 424, 151 S.E. 788 (1930).

as a general rule neither binds nor bars any one, yet a party who procures such a judgment to be entered in his favor may not in good conscience be heard to impeach it...." 254 S.C. at p. 471. Consequently, Duke may not now repudiate the Base Load Review Orders entered in its favor and is estopped from recovering its preconstruction costs in the instant docket. See also *Duke Power Co. v. South Carolina Public Service Commission*, 284 S.C. 81, 326 S.E.2d 395 (1985) holding that a public utility which promoted passage of legislation and accepted its benefits is estopped from challenging the validity of the legislation.

Duke cannot be heard to complain that the repeal of the BLRA works a hardship on it. Orders Nos. 2008-417 and 2011-454 were final and binding on Duke. Duke enjoyed the benefits of the upfront affirmation of its decision to incur preconstruction costs and was authorized to incur $60 million in preconstruction costs from its South Carolina ratepayers.[14] However, Duke continued to incur preconstruction costs after June 30, 2012 seeking recovery of these costs some of which were incurred as late as May 31, 2019. The BLRA authorized Duke to amend its Base Load Review order for authority to incur additional preconstruction costs after June 30, 2012. *South Carolina Energy Users Committee v. South Carolina Electric and Gas*, 410 S.C. 348, 764 S.E.2d913 (2014). However, Duke failed to seek to amend its project development orders. When Duke obtained its Combined Operating License on December 19, 2016, its preconstruction costs were known and measurable and Duke was free to apply to the Commission for recovery of these costs under the provisions of the BLRA. Duke determined to cancel the Lee Station Project by August 25, 2017 but continued to sit on its rights available pursuant to the BLRA. Duke could have sought recovery of its preconstruction costs prior to June 28, 2018 but failed to do so. Duke

[14] $251 million on Duke total system basis.

was not an innocent bystander to events and failed to act to protect the benefits it enjoyed under the BLRA.

Moreover, the generous recovery authorized by the Commission below was the direct result of Duke's delay in protecting its interests and those of its ratepayers under the BLRA.[15] Because Duke delayed in seeking recovery of its preconstruction costs, its AFUDC nearly quadrupled from that authorized by Order No. 2011-454. By June 30, 2012, Duke had incurred $68 million in AFUDC on a Duke total system basis. By the filing of the application below, these financing costs had ballooned to $248 million, approximately half of Duke's total system basis preconstruction costs.

Because AFUDC represents Duke's construction interest on the project, the longer Duke delays seeking recovery of these costs, the greater Duke's recovery from its ratepayers. Duke's ratepayers deserve protection from excessive or unreasonable costs. Costs incurred because of Duke's unexplained and unreasonable delay are necessarily imprudent. Rates based upon imprudent costs are not just and reasonable.

In *Georgia Power Co. v. Georgia Public Service Comm'n,* 196 Ga. App. 572, 578, 396 S.E.2d 562, 569 (1990) the Court upheld the disallowance by the Georgia Public Service Commission of substantial construction costs incurred by Georgia Power Co. in the construction of a nuclear plant. The Court recognized a utility should be held to a high standard of care in making decisions and taking actions in its planning and constructing of a nuclear project.

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[15] See Act 258, R287, H4375, Section 1, amending the BLRA which reads in part,
'Prudent', 'prudence', or 'prudency' also requires that any action or decision be made in a timely manner.
In determining whether any action or decision was prudent, the commission shall consider, including, but not limited to: (a) whether the utility acts in a timely manner, with any passage of time which results in increased costs or expense prior to the utility acting or making the decision weighing against a finding of prudency;

The Court recognized that ratepayers should not be held responsible for unreasonable costs. The Court in *Georgia Power Co. v. Georgia Public Service Comm'n,* quoted the following with approval:

> The PSC also noted that excessive or unreasonable costs could result from a decision that was prudent when made, but that '[t]he determinative issue is not whether the decision to incur the costs was prudent, but *who should bear such costs*. [footnote omitted] Such an expenditure represents *579 an additional expense to the project which is certainly more in the control of utility management than the ratepayers. Therefore, it is only appropriate that such excessive or unreasonable costs become the responsibility of the utility and not the ratepayer.' [Emphasis added]
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> *Georgia Power Co. v. Georgia Public Service Comm'n,* 196 Ga. App. 578-579.

The purpose of the Base Load Review Act was to provide for the utilities' recovery of prudently incurred costs while protecting ratepayers from responsibility for imprudent financial costs. *South Carolina Energy Users Committee v. South Carolina Public Service Commission,* 388 S.C. 486, 495, 697 S.E.2d 587 (2010), Given the generous treatment of preconstruction costs under the BLRA, and given the fact that Duke had six years to seek recovery of these costs prior to the repeal of the BLRA on June 28, 2018, Duke should be held accountable for the consequences of its failure to protect the interests of its ratepayers. Duke's preconstruction costs were excessive and unreasonable and consequently, Duke should bear the responsibility for these costs. The Commission erred in awarding Duke $125 million in preconstruction costs from its ratepayers.

CONCLUSION

The General Assembly never intended to reward Duke for its delay in seeking recovery of its preconstruction costs. In enacting Act 258, R287, H4375, Section 2.A, the General Assembly intended to protect ratepayers from recovery of preconstruction costs that were not used and useful for providing electricity. The BLRA was repealed prior to the filing of the application herein and Duke is foreclosed from recovery of its preconstruction costs pursuant to the repeal of the BLRA. Furthermore, having elected to recover its preconstruction costs pursuant to the BLRA, Duke is estopped from recovery of these costs under any other statute. The Commission erred in awarding Duke recovery of its preconstruction costs of $125 million. The Commission should be reversed, and the matter remanded to the Commission for proceedings to reduce Duke's rates by eliminating the recovery of preconstruction costs from rates.

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